Nos. 94-631, 94-797 and 94-929

IN THE

Supreme Court of the United States

October Term, 1994

ZELL MILLER, *et al.*,

Appellants,

and

UNITED STATES OF AMERICA and
LUCIOUS ABRAMS, JR., *et al.*,

Appellant-Intervenors,

versus

DAVIDA JOHNSON, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District of Georgia

MOTION AND BRIEF OF THE NATIONAL VOTING RIGHTS INSTITUTE AS *AMICUS CURIAE* SUPPORTING THE APPELLANTS

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(Appellant-Intervenors)
versus
Davida Johnson, et al. (Appellees)

MOTION OF THE NATIONAL VOTING RIGHTS INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN FAVOR OF APPELLANTS

Amicus National Voting Rights Institute is a non-profit litigation and public education organization formed to challenge the power of private wealth in the American political process. The Institute takes the position that majority-minority districts created under the Voting Rights Act amendments of 1982 are the principal points of access to Congress for poor and working-class Americans. *Amicus'* brief presents several central arguments not presented in either the petition in the

instant case or the briefs in Hays v. Louisiana.

All parties other than the appellees have consented to the filing of this brief. Appellees have indicated to *amicus* that they will not object to the filing of this brief; they declined to grant *amicus* affirmative permission simply out of a concern that the volume of briefs submitted would be too great, preferring to leave to this Court's discretion the decision whether to grant *amicus* permission to file.

Respectfully submitted,

February 21, 1995

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INTEREST OF *AMICUS CURIAE*

The National Voting Rights Institute is a non-profit litigation and public education organization formed to challenge the power of private wealth in the American political process. The Institute promotes the theory that the current regime of financing congressional campaigns --partial public financing for incumbent campaigns through the franking privilege and other subsidies and a private market for contributions dominated by big-money interests--is inconsistent with the requirements of equal protection. The Institute takes the position that majority-minority districts created under the Voting Rights Act amendments of 1982 are the principal points of access to Congress for poor and working-class Americans.

SUMMARY OF ARGUMENT

This brief concerns Shaw v. Reno, 113

S. Ct. 2816 (1993), as applied in Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga.) (per curiam; 2-1 decision), stay granted, 115 S. Ct. 36 (1994), and prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797, 94-929). Its first two sections address the district court's determination that Georgia's Eleventh Congressional District constitutes a racial gerrymander. It does so in large part by applying the theory developed in Thomas C. Goldstein, Note, "Unpacking and Applying Shaw v. Reno," 43 Am. U. L. Rev. 1135 (1994) [hereinafter Goldstein Note].

Initially, *amicus* assumes *arguendo* that the district court was correct to apply the "substantial or motivating factor" test drawn from Washington v. Davis, 426 U.S. 229 (1976), and its progeny. In applying the test, however, the court committed two clear errors. First, it failed to treat the standard as simply

threshold *prima facie* inquiry, and thereby applied an insufficiently rigorous test of racial motivation. Second, the district court without foundation significantly modified the test, inquiring whether race was "the" substantial or motivating factor in the district's construction.

Amicus next argues that the district court erred in even applying the substantial or motivating factor standard. That test guages racial motivation in challenges to *race-neutral* statutes. Shaw's concern, however, is with *racial classifications*, which by their very existence cause social harms. Such classifications exist only when they are motivated solely by race.

The district court also erred in overstating the importance of district shape, elevating this factor to constitutional. dimensions. Instead, the district court should have inquired whether

the district's boundaries principally mirrored racial-geographic lines, in effect dividing up the electorate according to race. Any other approach departs from the careful language of Shaw, which focuses on whether the only way to understand district lines is as an effort to segregate voters in apartheid fashion.

In the final section of this brief, *amicus* explains that unless the Supreme Court overrules the egregious doctrinal errors made by the district court, the nation could face the loss of many--if not most--majority-minority congressional districts. This outcome would force today's minority Representatives into majority-white districts where they will face extremely long electoral odds, not just because of white voters' traditional reluctance to pull the lever for non-whites, but because white candidates consistently collect more money and more campaign con-

tributions than minorities. Because money is a critical factor in electoral outcomes, minority politicians would obviously lose a great deal of ground. This Court should refrain from dismantling meaningful political opportunities for minority candidates and voters in this way, all in the name of equal protection.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE "SUBSTANTIAL OR MOTIVATING FACTOR" TEST

A. The District Court Failed To Recognize That The Substantial Or Motivating Factor Test Is Only A Threshold *Prima Facie* Inquiry

Essential to the district court's opinion was its view that "Shaw is premised on the uncontroversial proposition that race-based redistricting should be treated like any other race-based legislation." Miller, 864 F. Supp. at 1369. Accordingly, the district court relied on

Washington v. Davis as interpreted by Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), to articulate the standard by which racially motivated redistricting is to be judged:

> After Washington v. Davis, intent is an indispensable element of successful discrimination claims under the Fourteenth Amendment. . . . The Supreme Court has expounded on this intent requirement, holding that the Fourteenth Amendment is violated when race is a "substantial" or "motivating" factor in legislative decision-making.

864 F. Supp. at 1372 (citing Arlington Heights, 429 U.S. at 265-66, as "clarifying Washington v. Davis"; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

The district court was correct that Shaw applied Davis' purpose requirement to racial gerrymandering claims. Shaw is a Fourteenth Amendment case. Accordingly, Justice O'Connor's opinion is directed at "deliberate," 113 S. Ct. at 2823 (citation

omitted), and "purposeful[]," id. at 2824 (citing Davis), "effort[s]," id. at 2832, of the State.[1] The district court committed clear constitutional error, however, by misunderstanding and misapplying the standard articulated in Washington v. Davis and its progeny.[2]

The court's error was in using the "substantial or motivating factor" test as the ultimate gauge of equal protection violations. Specifically, the district court failed to understand that the Davis test is only a *prima facie* standard; the ultimate inquiry is far more stringent,

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[1]See also id. at 2819 (noting that case involved "race-based state legislation designed to benefit members of historically disadvantaged racial minority groups" (emphasis added)); id. at 2824 (recounting plaintiffs' allegation that "the State engaged in unconstitutional racial gerrymandering," which was "deliberate segregation" (emphasis added))

[2]This section addresses only whether the district court correctly interpreted Davis and its progeny. Amicus argues infra, however, that the Davis standard is not the correct test by which Shaw claims should be evaluated. See infra Part II.

and requires that after a *prima facie* case is made out, the State be given the opportunity to prove that the same decision would have resulted absent the racial factor. This conclusion is inescapable from a reading of a quartet of this Court's precedents: Davis, Arlington Heights, Mt. Healthy, and Hunter v. Underwood, 471 U.S. 222 (1985).

Initially, as the district court recognized, Davis made clear that the critical inquiry is into the State's purpose. 426 U.S. at 242. However, Davis also outlined a process for that inquiry whereby "[w]ith a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" Id. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632

(1972)). What Davis did not do was announce the degree of proof necessary to make out a *prima facie* case.

That ambiguity was resolved through a pair of cases decided the next year. In Arlington Heights, the Court inquired whether race was a "motivating" factor. 429 U.S. at 265-66. In Mt. Healthy, a unanimous Court articulated a parallel inquiry as whether race was a "substantial" factor. 429 U.S. at 285. Mt. Healthy made clear again, however, that this was only a threshold *prima facie* standard:

> We are thus brought to the issue whether . . . the fact that the protected conduct played a "substantial part" . . . would necessarily amount to a constitutional violation . . . . We think that it would not.
>
> . . .
>
> Initially, . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone

> on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.

Id. at 285-87 (footnote omitted).

The opinions in Davis, Arlington Heights, and Mt. Healthy were brought together by a unanimous Court in Hunter v. Underwood.[3] Underwood reviewed a court of appeals opinion that had initially inquired whether the plaintiffs had "'prove[n] by a preponderance of the evidence that racial discrimination was a substantial or motivating factor.'" 471 U.S. at 225 (quoting 730 F.2d at 617). With that burden met, the plaintiffs would "'prevail unless the [defendants] prove[d] by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.'"

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[3] See also infra note 8 (discussing this Court's rationale in Underwood).

Id. (quoting 730 F.2d at 617). This Court unanimously affirmed, ruling that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Id. at 228.[4] The Court in Underwood went on to formulate that same test as whether race was a "but for" motivation for the State's action. Id. at 232.

The district court's failure to conduct the full two-part inquiry justifies reversal for two reasons. First, by definition, the incomplete standard applied by the district court is less rigorous than the actual test required by this Court's precedents; plaintiffs' proof of substan-

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[4] See also United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986).

tial racial motivation merely creates the *inference* of unconstitutional conduct. The State is then given the opportunity to defeat that inference. Leaving the Court's *prima facie* framework in place while affirming the district court's opinion, which is based on the less demanding standard, would have the perverse result of making Shaw claims easier to establish than *any other* challenge to racially motivated legislation. This is paradoxical given the historical purposes of the Fourteenth Amendment, and clearly antithetical to Shaw's admonition that racial gerrymandering claims will "rare[ly]" be proven. 113 S. Ct. at 2825.

Even more alarming, affirming the decision below has the potential to greatly disturb, if not *sub silentio* overrule, the traditional Davis framework. The district court believed that it was faithfully applying the requirements of Davis and its

progeny; the court made no distinction between its own analysis and conducting a *prima facie* inquiry in discrimination cases not involving Shaw claims. If this Court affirms, it will indicate, contrary to Arlington Heights, Mt. Healthy, and Underwood, that a Fourteenth Amendment violation is established merely on proof of substantial racial motivation. There is no justification for such a radical doctrinal reversal.

B. The District Court Mistakenly Inquired Whether Race Constituted "The" Substantial Or Motivating Factor, Rather Than "A" Substantial Or Motivating Factor

The district court's opinion gives the impression that it may have realized the effect of its error, if not the cause.[5] Apparently recognizing that this

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[5]The court apparently concluded that a somewhat more rigid standard was necessary given the constant race-based requirements of the Voting Rights Act. In its view, if only "a" substantial factor were required, nearly all reapportionments would be subject to strict scrutiny review. 864 F. Supp. at 1373. It is not at all clear why a

Court's "*a* substantial or motivating factor" standard, standing alone, does not comport with Shaw's stringent requirements, the district court subtly attempted to compensate for its mistake by modifying the test. Citing no authority, the court took the position that race must be "*the* 'substantial' or 'motivating' factor behind a voting district," 864 F. Supp. at 1373 (emphasis added), to trigger strict scrutiny review.

The reason the court invoked no authority for this proposition is clear: none exists. In the Fourteenth Amendment context, no reported Supreme Court or

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statutory framework, standing alone, would affect the constitutional standard of review. That point is made in Shaw itself, which holds that Voting Rights Act compliance is relevant only once strict scrutiny is applied. 113 S. Ct. at 2830.

Ultimately, the district court was correct that a more stringent standard should be applied, though it chose the wrong standard for the wrong reason. The "obvious pretext" standard is the one mandated by Shaw, and it applies because of the nature of the plaintiff's injury, not the requirements of the Voting Rights Act. See infra Part II.

Court of Appeals decision has *ever* held that race must be *the* substantial or motivating factor. Compare id. with e.g., United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1216-17 (2d Cir. 1987) ("[T]he plaintiff need not show that the decision-maker was motivated solely, primarily, or even predominately by concerns that were racial . . . . Rather, the plaintiff need begin only by showing that race was "*a* motivating factor." (emphasis in Circuit Court opinion)). The same is true of the district court's further explanation of its test, that "race was the most prominent element driving the legislature's planning," 864 F. Supp. at 1372 n.19. No reported federal court decision had ever before taken that view.

More than an innovation, the district court's test contradicts settled law. The Arlington Heights inquiry into "a motivating factor" is by definition less strin-

gent than determining if race was "the most prominent" factor. "A" and "the" cannot equate in this context. It is a contradiction in terms to evaluate whether race was "a" "most prominent" factor; there can only be one *most* prominent factor.[6]

As with the district court's failure to properly integrate the *prima facie* framework, affirming its interpretation of the Davis standard would have substantial collateral effects on this Court's Fourteenth Amendment jurisprudence. From this point forward, a *prima facie* case of race discrimination would require that race be "the most prominent," rather than "a motivating," factor. This would dramatically "ratchet up" the level of proof required of plaintiffs, pre-empting *prima facie*

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[6]See Webster's Third New Unabridged International Dictionary 1474 (1986) (defining most as "the greatest of : the majority of").

Fourteenth Amendment claims where race is "one motivation among others of equal strength," id.[7]

The district court's approach would also unsettle the ultimate standard applied to race claims. How is a *prima facie* requirement that race be "the" substantial factor distinct from the inference created that race was a "but for" motivation? In fact, it is not difficult to conceive of circumstances in which race is a "but for" motivation, in that the challenged act would not otherwise have occurred, but is not "the most prominent" motivation, in that several factors of

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[7]Amicus urges that Shaw-type cases be decided under the obvious pretext standard, which is more stringent than that required by Davis and its progeny. See infra Part II. Therefore, unlike the district court's opinion, amicus' view would not have negative collateral effects on Fourteenth Amendment jurisprudence, as it is does not claim to overlap with or apply the test articulated in Arlington Heights and Mt. Healthy.

equal strength contributed.[8] In this sense, the *prima facie* requirement is perversely more demanding than the inference it ostensibly creates.[9]

Apart from profound inconsistencies with this Court's precedents, the decision

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[8]For example, Underwood involved a Fourteenth Amendment challenge to section 182 of Alabama's Constitution. Voters challenged a provision that disenfranchised persons convicted of crimes involving "moral turpitude" on the grounds that it had the purpose and effect of discriminating against blacks. 471 U.S. at 222. This Court unanimously rejected the State's defense "that the real purpose behind § 182 was to disenfranchise poor whites as well as blacks." Id. at 230. "[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but for' motivation for the enactment of § 1982." Id. at 232. Therefore, the Court concluded that while discrimination against blacks was not necessarily the "most prominent" motivation, in that discrimination against poor whites was just as important, it was still a "but for" motivation.

[9]This Court should be hesitant to attribute the difference between the Davis standard, correctly applied, and the standard applied below to a hypothetical effort by the district court to mold the Davis test to the Shaw context. The district court truly believed that it was correctly applying Davis. See 864 F. Supp. at 1373 ("A Shaw claim is an Equal Protection claim; if the Supreme Court were drastically narrowing the Fourteenth Amendment intent requirement articulated in Washington v. Davis and subsequent decisions--specifically for a subset of voting rights cases--it would have said so.").

below should be vacated based on its ambiguity. There is no way of determining what standard the district court ultimately applied. As noted above, there are references to race being both "a" and "the" motivating factor. The court's only effort at describing the test in more detail, set out in a footnote, leaves a cavernous gap between two possible extremes: Race may not be "the most prominent element" but may be "one motivation among others of equal strength." Id. What treatment should be given to racially motivated acts between those two standards is left unexplained.

II. THE DISTRICT COURT ERRED IN APPLYING THE "SUBSTANTIAL OR MOTIVATING FACTOR" STANDARD RATHER THAN THE MORE STRINGENT "OBVIOUS PRETEXT" STANDARD

Part I, supra, criticized the district court's misapplication of the "substantial or motivating factor" test. That discussion assumed *arguendo* that the ap-

proach developed through Washington v. Davis and its progeny indeed governed this case. In this Part, however, *amicus* challenges that premise, contending that courts should instead evaluate racial gerrymandering claims according to the substantially more rigorous "obvious pretext" standard.

A. The District Court Correctly Recognized That Appearance Serves Two Functions In The Racial Gerrymandering Inquiry

A major focus of Shaw v. Reno is appearance,[10] a characteristic that, as the district court recognized, serves double duty in racial gerrymandering claims. "Yes, appearances do matter, but in two extremely particular ways: (1) as a proxy for direct evidence of the legislature's intentions, and (2) as a harm

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[10]Importantly, "appearance" is not limited to district shape; it involves the totality of the publicly perceived circumstances. See infra Part II-D.

adequate to meet the constitutional criteria for standing to sue." Id. at 1370.[11]

From that solid foundation, however, the district court erred by reasoning that the dual function of appearance meant that a separate inquiry must be conducted into each function. As to "the legislature's intentions," id., the court applied the "substantial or motivating factor" test. As to harms, however, it conducted an independent and unrelated inquiry into the shape of the district.[12] By bifurcating its review, the district court failed to

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[11]Whether a racial gerrymandering claim can ever be sustained based purely on direct evidence of legislative intent (i.e., without any basis in outward appearance) is addressed in Goldstein Note, supra, at 1165-70.

[12]Amicus acknowledges the district court's statement that "[i]f the shape of the district advertises 'disregard' for [traditional districting principles] in favor of race-based line drawing, the district is a racial classification." Id. at 1369. Unfortunately, however, the district court never applied the facts of the instant case to that standard. Additionally, it is a correct statement of the law only if the court meant a nearly single-minded focus by the phrases "disregard" and "in favor."

realize that both functions of appearance are directly tied to the government's use of race. That error is clear from a review of the various harms cognizable under the Fourteenth Amendment.

B. Earlier Decisions Relied On Individual And Group Harms To Satisfy Article III's Injury-In-Fact Requirement

As this Court explained in Lujan v. Defenders of Wildlife, under Article III's case-or-controversy requirement, one "irreducible constitutional minimum of standing" is that "the plaintiff must have suffered an 'injury in fact.'" 112 S. Ct. 2130, 2136 (1992). Accordingly, in the Fourteenth Amendment context, a cause of action does not arise every time the government enacts legislation based in part on racial considerations; purpose alone is not enough.[13] For example, as Shaw reaf-

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13 Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301-02 (1993).

firms, facially neutral race-conscious measures may be challenged when they putatively cause a cognizable individual or group harm.

The prototypical individual-rights case in this context is Davis itself, 426 U.S. 229 (1976), cited in Shaw, 113 S. Ct. at 2824 (not contesting plaintiffs' allegation that African-Americans disproportionately failed police entrance exam). Shaw also cites group-rights cases with approval, acknowledging that "schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose *and have the effect* of diluting minority voting strength." 113 S. Ct. at 2823 (emphasis added). Explicit classifications could, of course, be challenged before Shaw as well. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (recognizing injury to white contractor from affirmative action program).

C. Shaw Recognizes A New Class Of Social Harms, Which Are Caused By Racial Classifications, Not Standard Facially Neutral Measures

The major jurisprudential innovation in Shaw was that this Court for the first time announced that no independent injury-in-fact was required to challenge explicit racial classifications[14] which *by their*

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[14]Shaw does not stand for the broader proposition that *all* racial classifications cause social harms. To do so would eliminate any requirement that the plaintiffs establish an individual or group injury in fact. That holding would reverse Northeastern Contractors, decided just two weeks before Shaw. Northeastern Contractors held that, in a challenge to an affirmative action program, Article III's injury-in-fact requirement was satisfied by "the denial of equal treatment resulting from the imposition of the barrier." 113 S. Ct. at 2303.

What makes Shaw and Northeastern Contractors consistent is the different nature of the challenged programs. Shaw involved a reapportionment plan that directly affected the representation of tens and hundreds of thousands of the State's voting citizens. According to the Court, its effects "threaten[ed] to undermine our system of representative democracy." 113 S. Ct. 2828. The program in Northeastern Contractors, on the other hand, was far more limited; only 10% of Jacksonville, Florida's city contracting was at issue. The far more extensive application of the reapportionment scheme therefore generated social harms, while the limited affirmative action program did not.

mere existence, cause social harms.[15] "*Classifications of citizens* solely on the basis of race 'are *by their very nature* odious to a free people whose institutions are founded upon the doctrine of equality.'" 113 S. Ct. at 2824 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (emphasis added)). In the racial gerrymandering context, classifications "reinforce[] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." Id. at 2827.[16]

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[15]See generally Goldstein Note, supra, at 1138-45, 1153-57. Perhaps just as important was this Court's statement that Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." 113 S. Ct. at 2824 (emphasis added). It is therefore irrelevant that a reapportionment does not discriminate against any individual or group.

[16]See also id. (explaining that racial gerrymandering makes "elected officials . . . more likely that their primary obligation is to represent only the members of that group, rather than their constituency as a whole").

The crucial distinction made in Shaw, but missed by the district court below, is therefore between facially neutral race-conscious legislation (with individual or group harms) on the one hand, and racial classifications (with social harms) on the other. Thus, while the district court read Shaw to require that "race-based redistricting . . . be treated like any other race-based legislation," 864 F. Supp. at 1369 (emphasis added), it mistakenly equated that standard with Davis and its progeny, holding that "[t]he proper interpretation of Shaw v. Reno's 'race-based' requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question," id. at 1372 (emphasis

in original).[17] Shaw, in fact holds that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' demands the same close scrutiny that we give other state laws that *classify citizens by race*." 113 S. Ct. at 2825 (citation omitted; emphasis added).[18]

This is no mere choice among synonyms. Without exception, at the very least since Washington v. Davis, every time that this Court has discussed a "racial classification," it has been referring to the explicit, open, and publicly acknowledged categorization of individuals

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[17]The district court thus incorrectly concluded that a racial classification is established upon proof of substantial racial motivation. See text accompanying this note; 864 F. Supp. at 1369 (equating "race-based legislation" with "racial classifications").

[18]Thus, Shaw identifies racial gerrymanders as "racial classifications with respect to voting." Id. at 2832; see also id. at 2830 (comparing racial gerrymanders with "other kinds of racial classification").

on the basis of race.[19] Facially neutral measures of the kind addressed in Davis and Arlington Heights have *never* been included under that rubric.[20] It is therefore not surprising that Shaw never invokes the "substantial or motivating factor" test of Arlington Heights and Mt. Healthy.[21]

Blurring this distinction would over rule a substantial proportion of this

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[19]Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (preference in broadcasting licenses); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (minority contracting set-aside); United States v. Paradise, 480 U.S. 149 (1987) (police hiring quota); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (union membership quota); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (layoff preference); Palmore v. Sidoti, 466 U.S. 429 (1984) (child custody decision); Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority business enterprise funding set-aside); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (admissions set-aside).

[20]Cf. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484-85 (1982) (distinguishing Hunter v. Erickson, 393 U.S. 385 (1969) from Davis and Feeney).

[21]In fact, the only time Shaw cites Washington v. Davis is for the proposition that purposeful discrimination is relevant to Fourteenth Amendment claims. 113 S. Ct. at 2824.

Court's Fourteenth Amendment jurisprudence: The effects prong in cases involving facially neutral measures would simply disappear. For example, it would no longer be true that vote-dilution claims require "a discriminatory purpose *and* . . . *the effect* of diluting minority voting strength," Shaw, 113 S. Ct. at 2823 (emphasis added). Social harms would independently satisfy Article III, making actual vote-dilution an extraneous element of the claim.

Therefore, an essential part of the distinction between Davis-type facially neutral measures and Shaw-type racial classifications is the injury each requires: challenges to standard facially neutral measures require some individual or group harm; challenges to racial classifications that cause social harms do not. In the voting rights context, vote-dilution and vote-deprivation are group

and individual injuries previously found cognizable by this Court. See Shaw, 113 S. Ct. at 2823 (collecting cases). There fore, when such injuries are at issue, Article III is satisfied.[22] In contrast, plaintiffs in racial gerrymandering cases can identify no such individual or group injury-in-fact unrelated to the government's use of race; their cognizable harm must stem immediately and directly from the existence of a government-enacted racial classification. "*Classifying citizens by race* . . . threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis." Shaw, 113 S. Ct. at 2828 (emphasis

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[22]To invoke the protections of the Fourteenth Amendment, the plaintiffs must also satisfy the "substantial or motivating factor" formulation discussed in Part I, supra. The district court court's use of that test would therefore have been appropriate if the harm at issue were vote-dilution or vote-deprivation: A prima facie Fourteenth Amendment violation would be established by that test, and Article III's injury-in-fact requirement would be satisfied by the dilution or deprivation of the right to vote.

added); see also id. ("[R]eapportionment legislation that *cannot be understood as anything other than an effort to classify* and separate voters by race injures voters in other ways." (emphasis added)); id. at 2832 ("*Racial classifications* with respect to voting carry particular dangers." (emphasis added)).

D. Shaw Recognizes That Some "Rare" Cases Will Involve Facially Neutral Measures That Are "obvious pretext[s] for racial classification"

While Shaw does distinguish racial classifications from Davis-type facially neutral measures, it does not hold that only challenges to *explicit* classifications may rest on social harms. "These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" Shaw, 113 S. Ct. at 2825 (quoting

Arlington Heights, 429 U.S. at 256). According to Shaw, such measures are "'obvious pretext[s] for racial classification.'" Id. (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

As the above discussion establishes, these "rare" statutes do not merely involve substantial racial motivation; social harms arise only from racial classification.[23] Given that reapportionments are facially neutral, the issue thus be-

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[23]The district court attempted to equate Shaw's "unexplainable on grounds other than race" standard with the "substantial factor" test because both appear in the Arlington Heights opinion. 864 F. Supp. at 1372. Arlington Heights, however, never equates the two. The two types of inquiries are separate and distinct.

> Feeney explicitly makes this very point:
> When a statute gender-neutral on its face is challenged on the ground that its effect upon women are disproportionately adverse, a two-fold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, *covert or overt*, is not based upon gender the second question is whether the adverse effect reflects invidious gender-based discrimination.

442 U.S. at 274 (emphasis added; citing Arlington Heights).

comes what characteristic distinguishes a Davis-type claim (which requires individual or group harm) from an "obvious pretext for racial classification" (which does not).

1. The district court overemphasized the importance of shape as an independent factor

Shape was the only nonracial factor invoked by the district court in assessing whether District Eleven was a racial gerrymander. The court thus apparently viewed shape as the characteristic that distinguishes obvious pretexts from other facially neutral measures, noting "that a bizarre district shape is indeed a 'threshold' for purposes of standing." 864 F. Supp. at 1374 n.24. It took this view after interpreting Shaw as creating a right "to challenge a strangely shaped voting district as an impermissible racial gerrymander." Id. at 1359.

While Shaw certainly makes shape relevant to the racial gerrymandering inquiry, the district court's approach overestimates its value. Shape cannot be an independent determinant of Article III injury in fact because this Court has never held that untoward district shape causes any cognizable injury. For example, if shape alone were sufficient, Davis v. Bandemer would not require that plaintiffs in *political* gerrymandering cases always establish that they have been systematically excluded from the political process, 478 U.S. 109, 127 (1986).

In addition, a focus on shape is underinclusive, not encompassing voting schemes clearly contemplated by Shaw. This is the lesson of Gomillion v. Lightfoot, 364 U.S. 339 (1960), invoked by Shaw as a racial gerrymander, 113 S. Ct. at 2823, 2825-26. Professors Pildes and Niemi have calculated that, according to

various statistical measures, 239 current congressional districts are more gerrymandered than the boundaries of Tuskegee at issue in Gomillion. Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno," 92 Mich. L. Rev. 483, 552 & n.192, 564 n.229 (1993). Unless the district court's test includes essentially all configurations other than circles and squares, it therefore cannot account for the Gomillion example.

Finally, the district court's approach is fundamentally flawed because it elevates district shape to constitutional stature: Only plaintiffs challenging those districts with "bizarre" cartography would satisfy Article III's standing requirement. This suggestion is directly contrary to Shaw's "emphasi[s] that these criteria are important not because they

are constitutionally required--they are not," 113 S. Ct. at 2827, and odd in light of the district court's own recognition that "[w]hat the Supreme Court did *not* do is imbue geography with constitutional significance," 864 F. Supp. at 1374 (emphasis added).[24]

2. Shaw's emphasis on "appearance" equates with the need for district lines to mirror racial lines

The opinion below thus essentially bifurcated the "racial gerrymandering" inquiry into an examination of race, see Part I, supra, and a separate examination of gerrymandering, or shape. Shaw, on the other hand, emphasizes not shape but "appearance." While shape is a factor, the focus is properly on the public's likely perception of factors controlling the district's construction. Thus, Justice

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[24]This "approach would [thus] make district shape a (previously unheard of) threshold to constitutional claims." Id.

O'Connor's opinion was concerned that "obvious[]" racial gerrymandering "signal[s]" and "sends" a "message," id. at 2827-28, that "immediately offends principles of racial equality," id. at 2829, the "perception" of which reinforces "stereotype[s]," id. at 2827.[25]

As was explained above, this focus on appearance is rooted in Article III. A predicate to social harms is the social perception of a racial classification. In the racial gerrymandering context, social harms thus require that the district's boundaries appear to have been completely dominated by racial considerations.[26]

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[25]See also id. at 2824 ("resembles"); id. at 2827 ("resemblance")

[26]The required race-based nature of this perception stems from the different nature of the injury recognized in Shaw as compared to injuries found in other decisions. Those harms differ not just in form (i.e., social versus individual or group), but also in stimulus. Individual and group harms bear no intrinsic relationship to the fact that the government's action was race-based: the plaintiffs in Davis were unable to become police officers; the contractor in Croson could not compete equally with minority firms. There is no

Accordingly, the crucial factor is not merely shape, but the obvious correlation between district lines and racial lines. This is the only approach that takes Gomillion into account. In that case, the challenged measure "fenced out" ninety-nine percent of the city's black voters, but no white voters. 364 U.S. at 140-41. Thus, while the boundaries involved were not overwhelmingly extreme,[27] the only conceivable explanation for them was racial discrimination.[28]

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direct tie between those injuries and the government's use of race: each would have been just as actionable if caused by the creation of an illegitimate speech classification or some other non-race-based classification. Social harms, in contrast, are *directly tied* to the existence of the racial classification itself.

[27]This is not to say that shape is irrelevant. Without fairly remarkable cartography, it will never be "obvious" that the district mirrors racial lines: some other motivation, particularly maintaining compact districts, will be perceived as equally or more plausible.

[28]Goldstein Note, supra, at 1185-90, sets out a "totality of the circumstances" approach to incorporating both shape and racial correlation into the racial gerrymandering inquiry.

3. The district court's test for appearances was not sufficiently demanding

A major problem in evaluating the district court's approach to determining whether District Eleven is a racial classification is that it is unclear what standard was applied. At times, the district court at least paid lip service to Shaw's repeated emphasis on the stringent nature of the inquiry. For example, it referred to Shaw's requirement that the district be inexplicable on nonracial grounds, 864 F. Supp. at 1369, which it equated with "a voting district [in which] racial concerns are the only ones plausibly to be inferred from the district's lines," id. at 1373.

In application, however, the district court's approach was dramatically less demanding. In its view, the State of Georgia could only "alter the occasional line," id., and make race "a factor . . .

meaning one factor given no more prominence than various others," id. (emphasis in original).

This last formulation is particularly troubling. A standard that permits race to be only one factor among equals will often mistakenly find racial gerrymandering through what could be termed a "plurality effect." Consider, for example, a hypothetical redistricting statute that is bizarrely shaped and motivated 40% by race, 20% by incumbency, 20% by partisan politics, and 20% by compactness.[29] The district court would erroneously hold it to be a racial gerrymander because race is not "one factor among *many of equal or greater significance* to the drafters."

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[29]This is, of course, a dramatic oversimplification of the wide range of factors that influence the redistricting process. That fact, however, only supports *amicus'* argument. The more factors involved, the less likely it is that any single one will be substantial enough to be of "equal or greater significance" to race, which the Voting Rights Act mandates as a first-order consideration.

Id. at 1372. This would be the approach despite the fact that race in this example constituted not even one-half of the motivation for the district's design.

What the district court thus failed to realize is that Shaw, like this Court's Fourteenth Amendment doctrine generally, evaluates race not against each nonracial factor *alone*, but *against the sum of all nonracial motivations*. Social harms arise, after all, only from a *racial* classification.

Shaw not only measures race against the totality of nonracial factors, it also explicitly requires substantially more racial motivation as a predicate to finding a racial gerrymander than the district court did. Shaw repeatedly emphasizes the extraordinary proof required to find a racial classification, using ten different

phrases to make the point.[30] Thus, race must appear to be the *only* motivation for the district.[31] In particular, Shaw's

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[30]See id. at 2824 ("rationally can be viewed only"); id. at 2825 ("unexplainable on grounds other"); id. ("could not be explained on grounds other"); id. at 2826 ("could be explained only"); id. ("permit of no other conclusion"); id. at 2827 ("obviously . . . created solely"); id. at 2828 ("rationally cannot be understood as anything other"); id. at 2829 ("immediately offends"); id. ("rationally could be understood only"); id. at 2830 ("cannot be understood as anything other"); id. at 2832 ("can be understood only").

The Court in Shaw even went so far as to invoke the value-laden term "rationally," implying that some form of deferential rationality review applies. See id. at 2824 ("rationally can be viewed only"); id. at 2826, 2828, 2830 ("rationally cannot be understood as anything other"); id. at 2829 ("rationally could be understood only"). This is a far cry from the district court's "substantial or motivating" factor inquiry.

[31]See, e.g., id. at 2824 ("rationally can be viewed only as an effort to segregate"); id. at 2826 ("district lines [that] could 'be explained only in racial terms'" (quoting Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (Harlan, J., dissenting))); id. at 2829 ("rationally could be understood only as an effort to segregate"); id. at 2832 ("reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate").

Some have downplayed Shaw's invocation of the word "only" on the ground that all districts, even those that are racial gerrymanders, must comply with the one-person one-vote requirement of Reynolds v. Sims, 377 U.S. 533 (1964). This is mistaken, however, because while the social harms outlined in Shaw are concerned with influences in the districting process, they turn more directly on those factors used to distinguish "*between individuals*," Shaw, 113 S. Ct. at 2824 (emphasis added). The one-person one-vote requirement is never used

specific discussion of social harms is clearly limited to those reapportionments which are designed "solely on the basis of race," id. at 2824, and which "expressly distinguish[] among citizens because of their race," id. at 2825.

The district court attempted to shrug off this overwhelmingly strong language on the ground that it "begs the question: How to determine if a district is so founded upon race that it warrants constitutional notice?," 864 F. Supp. at 1369. *Amicus* respectfully disagrees: Shaw speaks for itself. There is no ambiguity in the phrases "sole[]," 113 S. Ct. at 2824, "only," id., and "unexplainable," id. at 2825.

4. The facts found by the district court do not support

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to distinguish *between* individuals; its only litmus test is whether the individual is alive. Factors such as race, party, and incumbency, on the other hand, are characteristics used by the legislature to distinguish one individual from another.

the conclusion that District Eleven is an obvious pretext for racial classification

That the district court applied a less stringent standard than Shaw requires is clear from its application of the facts before it. The court focused on the appendages lying at the extremes of District Eleven, ignoring the data relating to the vast majority of the district's appearance. Compare 864 F. Supp. at 1375-77 with id. at 1396-97 (Edmondson, J., dissenting). The court did so because it felt that Shaw was satisfied by the conclusion that race was "sometimes the only purpose," id. at 1375 (majority opinion) behind the design of those appendages.

Shaw, however, demands more. Social harms relate to the perception of the district, and thus require not only that race be the only motivation, but that it be the only motivation for the district *on the*

whole.[32] The fact that race was a predominant factor in the inclusion of certain geographic areas does not make the district "unexplainable" on grounds other than race.

This is clear from a review of the "max-black" plan, which *was* solely designed based on race. That plan includes the areas that constitute the appendages in the final design of District Eleven. It also does much more, however, consistently meandering across and through counties, precincts, and towns, with the obvi ous exclusive purpose of capturing black

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[32]The question whether direct evidence of the State's purpose (e.g., legislative history) is relevant can be answered by reference to the functions of Article III and the Fourteenth Amendment in a racial gerrymandering claim. If only the Fourteenth Amendment were involved, Davis teaches that such direct evidence would be relevant. But in Shaw-type cases, the primary question is whether there is an obvious racial classification. The Article III function of social harms makes objective factors central. Once plaintiffs successfully demonstrate the existence of a racial classification through such indirect evidence, there is no need to conduct the "substantial or motivating factor" inquiry; proof of a racial classification more than satisfies the requirements of Davis.

voters. District Eleven, on the other hand, has a much more cohesive central core, designed not according to race, but instead along county lines and other traditional districting criteria. See id. at 1394-97 (Edmondson, J., dissenting).

III. SWEEPING DISSOLUTION OF MINORITY DISTRICTS WILL DISADVANTAGE MINORITY CANDIDATES BY FORCING THEM TO RUN IN MAJORITY-WHITE DISTRICTS AGAINST CANDIDATES WHO ARE ABLE TO RAISE AND SPEND FAR MORE MONEY, A FACTOR WHICH IS KEY TO VICTORY

Unless the Supreme Court corrects the egregious doctrinal errors made by the district court, the nation could face the loss of many--if not most--majority-minority congressional districts. Furthermore, there are already similar challenges to state and local districting plans underway in Louisiana, Ohio, and Texas, suggesting that there could be a wave of invalidations of minority districts at different levels across the country.

These are profoundly troubling devel-

opments. There can be no escaping the reality that "blacks are very unlikely to be elected from any districts that are not majority-minority." Bernard Grofman, et al., Minority Representation and the Quest for Voting Equality 134 (1994). There are presently no African-American Governors in the fifty states and only one African-American United States Senator. Almanac of American Politics (1994). Out of the 435 Representatives in the United States House, there are 40 members of the Congressional Black Caucus, but only 3 represent majority-white constituencies. At the state level, approximately 90% of African-American legislators represent majority-black districts. Chandler Davidson & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation," in Quiet Revolution in the South 335, 337 (Lisa Handley & Bernard Grofman eds., 1994).

Dismantling the bulk of majority-minority districts will reverse the impressive gains minorities have made as elected officials since Congress amended the Voting Rights Act in 1982. This prediction is based not only on the well-documented and well-known racial character of white citizens' voting patterns, but also on the nature of the modern campaign fundraising process, which systematically advantages white and wealthy candidates and disadvantages minorities and champions of the poor. Even if every white voter were to go to the polling place with an open mind and no prejudice, minority candidates will have already been undercut by the fact that white candidates dramatically outraise them in the race for campaign funds.

The current campaign fundraising regime has been described as a "wealth primary" in which candidates, if they are not

personally affluent, must compete to collect large contributions from wealthy donors and political action committees (PACs). See Jamin Raskin & John Bonifaz, "Equal Protection and the Wealth Primary," 11 Yale L. & Pol'y Rev. 273, 287-97 (1993) (describing the political dominance of big money interests in deciding who can run for federal office). At the congressional level, this cash competition has driven the costs of running for office to exorbitant heights.

In 1992, a seat in the U.S. Senate cost, on average, $3.9 million to win, while victory in the U.S. House of Representatives cost, on average, $543,000. Id. at 288. These averages are indeed "artificially small" since so many incumbents have safely defeated opponents over the years--in both money and votes--and can afford to slow down their fundraising efforts. Id. In 1992, for example, four

out of every five House incumbents faced either no challenger or a challenger with so little money as not to be deemed a viable candidate. Id. When races feature meaningful competition, it becomes clear how unreachable political candidacy is for the average citizen and how much money must be raised to be a serious contender. For example, in the 1994 U.S. Senate race in California, millionaire Senator Diane Feinstein and her Republican opponent, millionaire Congressman Michael Huffington, spent a combined total of $41.5 million in their neck-and-neck race. "Wilson Victory at Ballot Box Matched Fund-Raising Efforts," San Fran. Examiner, Feb. 4, 1995.

The high costs of campaigning reflect the fact that those "candidates who spend the most money are consistently the most likely to win." Jamin Raskin & John Bonifaz, "The Constitutional Imperative

and Practical Superiority of Democratically Financed Elections," 94 Colum. L. Rev. 1160, 1175 (1994). In 388 of 435 House races in 1992, the candidate who spent the most won. Id. In the thirty-six Senate races that year, thirty-one of the winners outspent their opponents. Id.

Because of the harsh rules of the wealth primary, serious candidates "must have either great personal wealth or a political program compatible with the interests of those who do." Id. For it is no longer "possible to run a House or Senate campaign on the force of small contributions." Id. Rather, campaigns are won and lost by virtue of large contributions from affluent citizens and PACs. "Less than one percent of the nation's population contributed seventy-seven percent of all campaign funds raised in the 1992 election cycle in individual contributions of $200 or more." Id. According to the

1992 Citizen Participation Project survey directed by Dr. Sidney Verba of Harvard University, the "richest" citizens making more than $75,000 a year are "100 times more likely" than poor citizens "to contribute to a political candidate." Id. (citation and quotation marks omitted). Furthermore, this study found that among those giving campaign money, "there is a substantial difference in the *amount* given. The rich give a great deal more." The Citizen Participation Project, 1992 Survey: Summary of Findings 5 (1992).

Because the wealth primary is skewed to favor independently wealthy candidates and those who can collect large numbers of big contributions from wealthy individuals and PACs, it creates a terribly hostile environment for minority candidates. The "distribution of wealth in the United States is more unequal than in any other industrialized nation," Stephen Loffredo,

"Poverty, Democracy and Constitutional Law," 141 U. Pa. L. Rev. 1277, 1386 (1993), and racial minorities have much less wealth and income than whites. See, e.g., Richard A. Epstein, "Caste and the Civil Rights Laws," 92 Mich. L. Rev. 2456, 2463 (1994) (pointing out that white America ranks first among nations on earth in terms of life expectancy at birth, education, and income, while African-Americans rank thirty-second behind Trinidad and Tobago, and Hispanics rank thirty-fifth behind Estonia); Press Release, "Median Net Worth of Nation's Households Dropped 12 Percent Between 1988 and 1991" (Jan. 26, 1994) (stating that white households had a median net worth of $44,408, while African-American households had a median net worth of $4,604, and Hispanic households had a median net worth of $5,345). This deep racial disparity in wealth and income means that the vast majority of

African-Americans have less money with which to finance their own political campaigns or make political campaign contributions to others.

Through existing majority-minority districts, the tremendous financial disabilities suffered by minority candidates have been mitigated by the fact that such candidates have competed principally against one another. If minority districts are lost, minority candidates will be thrust into electoral arenas where white rivals will begin with greater personal wealth and then go on to collect much more money in districts already predisposed to dismiss minority candidates.

These conclusions are not idle speculation. The Chicago Urban League recently performed an exhaustive study of the relationship between race and campaign contributions in the 1991 Chicago City Council elections. The study produced stunning

findings. In these elections, money was a critical factor because the strongest predictors of candidate vote totals were "incumbency and the level of campaign expenditures." James Lewis, et al., Equality of Opportunity? Financing 1991 Campaigns for the Chicago City Council i (1995). Meanwhile, the race of the candidate was "the most important determinant of how much money a candidate will be able to raise." Id. at 8. On average, the study found that "whites raised approximately 5 times as much for city council races as did African-Americans and approximately 1.5 times more than did Latinos." Id. at i. The average white candidate raised $42,068 more than the average African-American candidate for City Council and $32,617 more than the average Hispanic candidate. Id. at 8.

The Urban League found that the "huge difference between contribution totals for

African-Americans and whites" was "primarily attributable to the total number of contributions given rather than to their size." Id. at i. That is, those people in minority communities who could afford to give substantial contributions to their favored candidates did so, but far fewer could in fact afford to do so than residents of white neighborhoods. "Higher income communities generate significantly more individual campaign contributions than lower income communities." Id. Because "income and race are so closely correlated" in Chicago (as in the rest of the country), the study concluded that the relative scarcity of funds in minority neighborhoods presented "a serious problem" for "minority candidates running in wards that have significant white middle- or upper-class neighborhoods that produce white candidates." Id.

Indeed, the study found that every

time a white candidate faced minority candidates--even in predominantly minority communities--the white candidate was able to raise more funds. Meanwhile, no African-American or Hispanic alderman "has ever been elected from a majority white ward." Id. at 7.

The Chicago study offers a sobering glimpse of the fate of minority candidates forced into majority-white districts. Of course, we could speak with even more confidence if we had a study of patterns of fundraising and electoral success by minority candidates running in majority-white congressional districts, but so few ever attempt the feat that such a study would have principally anecdotal value. In fact, according to data provided to *amicus* by the Center for Responsive Politics, results of the rare cases in which minorities attempt to take on white candidates at the state level reinforce the

conclusions of the Chicago study. Only two minorities faced white candidates for U.S. Senate seats in 1994 and both lost--first in the wealth primary and then at the ballot box. In the state of Washington, Republican Slade Gorton raised $4.8 million to defeat his African-American opponent, Democrat Ron Sims, who managed to raise only $1.2 million. Meanwhile, in Missouri, Republican John Ashcroft spent $4.2 million to defeat his African-American opponent, Congressman Alan Wheat, who--even as a sitting member of the U.S. House of Representatives--was able to collect only $3.4 million, an eight-hundred thousand dollar difference.

By driving minority elected officials into majority-white jurisdictions and reducing their numbers in office, a juridical assault on minority districts will damage the effective political representation of minorities and the non-affluent.

In the past, the Supreme Court has refused to countenance electoral practices that dilute the political opportunities of the poor. See Bullock v. Carter, 405 U.S. 134, 143-44 (1972) (striking down exorbitant candidate filing fees in Texas primary elections; stating that the fees gave the political system a "patently exclusionary character" by excluding "potential office seekers lacking both personal wealth and affluent backers" and thus reducing the electoral choices of the "less affluent segment of the community"); Harper v. State Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down a $1.50 poll tax in Virginia elections on ground that voter qualifications "have no relation to wealth"). The Court should not uphold flawed lower court decisions that threaten to erode the recent electoral successes of minority candidates and further reduce the political power of the

poor.

It is possible that Congresswoman Cynthia McKinney, if forced into a majority-white district, could overcome the traditional fundraising advantages that white candidates have, as well as the historic resistance of whites to voting for African-Americans, in order to defeat her opponents. But honesty compels us to admit that it is not at all likely. The future is better foretold by Congressman Cleo Fields, whose Louisiana district has been dismembered by another "racial gerrymandering" decision, Hays v. Louisiana. After having his district struck down, Congressman Fields has chosen to bypass the next campaign in a majority-white district. It is hard to second-guess his decision since no minority has ever been sent to Congress by a majority-white district in Louisiana. In sum, when we consider the racial consequences of the

wealth primary with traditional patterns of racially polarized voting, the reduction of majority-minority districts will almost certainly mean reduction of minority representation in Congress.

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the judgment of the district court.

Respectfully submitted,

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